

(e) **Cost of collecting tips charged on credit cards, over and above the amount charged by the credit card company**

Costs incurred by the employer related to credit card use, other than the fee charged by a credit card company for processing, may not be used to reduce the amount of the tips the employer must distribute to the tipped employee. Such costs include, but are not limited to:

- (1) the “time value of credit card collections,”
- (2) the cost of the credit card terminal, and
- (3) the cost of dedicated phone lines.

Any employer attempt to deduct an average standard composite amount for tip liquidation that exceeds the amount charged by the credit card companies is not acceptable.

WHD Opinion Letter FLSA 2006-1

[12/15/2016]

**30d06** **Determining the tip credit an employer may claim against its minimum wage obligations.**

(a) **General**

Section 3(m) limits the tip credit an employer may claim against its minimum wage obligations to the difference between the section 6(a)(1) minimum wage and the cash wage paid by the employer. Under this formula, the direct or cash wage paid by the employer, which may not be less than \$2.13 per hour, plus the FLSA 3(m) tip credit (*i.e.*, the difference between the section 6(a)(1) wage and the cash wage paid) always equals the section 6(a)(1) minimum wage. Under the 3(m) formula, payment of a higher cash wage by the employer will result in a lower FLSA 3(m) tip credit. An employee paid with the FLSA 3(m) tip credit has only been paid the FLSA minimum wage in non-overtime workweeks, and therefore the employer may not take non-3(m) deductions for shortages, breakage, cost of uniforms, etc.

(b) **Examples**

For purposes of these examples, assume: the section 6(a)(1) wage rate is \$7.25 per hour, the employee worked no overtime hours, the employee meets the section 3(t) definition of tipped employee, the employer properly advised the employee in advance of the requirements outlined in 29 CFR 531.59(b), and that the employer maintained appropriate payroll records.

- (1) These examples illustrate that the amount of the FLSA 3(m) tip credit will vary depending on the cash or direct wage paid to the employee.
  - a. If the employer pays a cash wage paid of \$2.13 per hour, it may claim a tip credit of \$5.12 per hour ( $\$7.25 - \$2.13 = \$5.12$ ).
  - b. If the employer pays a cash wage paid of \$3.63 per hour, it may claim a tip credit of \$3.62 per hour ( $\$7.25 - \$3.63 = \$3.62$ ).

- c. If the employer pays a cash wage paid of \$4.86 per hour, it may claim a tip credit of \$2.39 per hour ( $\$7.25 - \$4.86 = \$2.39$ ).
  - d. If the employer pays a cash wage of less than the minimum required by the FLSA (\$2.13 per hour), it may not claim an FLSA 3(m) tip credit and must pay the difference between the minimum wage and the cash wage that was paid. For example, if an employer pays a cash wage of \$2.00 per hour, it would not be entitled to claim an FLSA 3(m) tip credit and must also pay \$5.25 per hour as the difference between the minimum wage and the cash wage paid ( $\$7.25 - \$2.00 = \$5.25$ ).
- (2) When the state minimum wage is higher than the section 6(a)(1) wage, the formula in section 3(m) still limits the amount of the FLSA 3(m) tip credit the employer may claim to the difference between the cash wage paid and the federal minimum wage. As illustrated in the examples below, where the state recognizes a higher tip credit than the FLSA 3(m) tip credit, there will not be a FLSA minimum wage violation as long as the employer has paid a cash wage of at least \$2.13 per hour and the employee receives sufficient tips to satisfy the section 6(a)(1) minimum wage.
- a. The state minimum wage is \$7.40 per hour. The employer pays a cash wage of \$2.89 per hour as required by the state law and claims a tip credit of \$4.51 per hour as permitted under state law ( $\$7.40 - \$2.89 = \$4.51$ ). However, the employer is limited to an FLSA 3(m) tip credit of \$4.36 ( $\$7.25 - \$2.89 = \$4.36$ ).
- $\$7.25$  (FLSA minimum wage) -  $\$2.89$  (cash wage paid) =  $\$4.36$  (FLSA 3(m) tip credit)
- $\$7.40$  (state minimum wage) -  $\$2.89$  (cash wage paid) =  $\$4.51$  (state tip credit)
- Even though the employer has paid a direct wage in excess of the required minimum of \$2.13, for FLSA purposes the employee has received only \$7.25 per hour.
- b. The state minimum wage is \$8.15 per hour. The employer pays a cash wage of \$3.95 as required by state law and claims a tip credit of \$4.20 per hour as permitted under state law ( $\$8.15 - \$3.95 = \$4.20$ ). The employer is limited to an FLSA 3(m) tip credit of \$3.30 ( $\$7.25 - \$3.95 = \$3.30$ ).
- $\$7.25$  (FLSA minimum wage) -  $\$3.95$  (cash wage paid) =  $\$3.30$  (FLSA 3(m) tip credit)
- $\$8.15$  (state minimum wage) -  $\$3.95$  (cash wage paid) =  $\$4.20$  (state tip credit)

Even though the employer has paid a direct wage in excess of the required minimum of \$2.13, for FLSA purposes the employee has received only \$7.25 per hour.

- c. The state minimum wage is \$7.50 per hour, and the state requires a cash wage of at least \$2.13 per hour. The employer claims a tip credit of \$5.37 per hour ( $\$7.50 - \$2.13 = \$5.37$ ) as permitted under state law. The employer is limited to an FLSA 3(m) tip credit of \$5.12 ( $\$7.25 - \$2.13 = \$5.12$ ).

$\$7.25$  (FLSA minimum wage) -  $\$2.13$  (cash wage paid) =  $\$5.12$  (FLSA 3(m) tip credit)

$\$7.50$  (state minimum wage) -  $\$2.13$  (cash wage paid) =  $\$5.37$  (state tip credit)

For FLSA purposes, the employee has received only \$7.25 per hour.

[12/15/2016]

**30d07      FLSA 3(m) tip credit in overtime hours.**

An employer may not take a higher FLSA 3(m) tip credit against its minimum wage obligations during overtime hours than is taken during non-overtime hours. *See* FOH 32j18 regarding overtime computations for tipped employees. Under certain circumstances, an employer may be able to claim an additional overtime tip credit against its overtime obligations.

[12/15/2016]

**30d08      IRS tip allocation rules.**

Where an employer withholds taxes from a tipped employee based upon a percentage of sales, rather than on reported tips, a reduction in an individual employee's net pay may result, but this is not an FLSA violation.

[12/15/2016]

**30e      FLSA SECTION 6(e)(1): CONTRACT SERVICES OTHER THAN LINEN SUPPLY**

**30e00      General provisions: section 6(e)(1), contract services (other than linen supply services).**

Section 6(e)(1) of the FLSA provides: "Notwithstanding the provisions of section 13 of this act (except subsections (a)(1) and (f) thereof), every employer providing any contract services (other than linen supply services) under a contract with the United States or any subcontract thereunder shall pay to each of his employees whose rate of pay is not governed by the Service Contract Act of 1965 (41 USC 351-357) or to whom subsection (a)(1) of this section is not applicable, wages at rates not less than the rates provided for in subsection (b) of this section." (Effective 12/31/1977, subsection (b) provided for payment of wage rates not less than those provided in subsection (a)(1).)